Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

WILMA WILSON,

Petitioner

v.

THE WORKERS' COMPENSATION APPEALS BOARD of the State of California; ET AL,

Defendants

On Petition for A Writ of Certiorari or Other Appropriate Relief to the Court of Appeals for the Ninth Circuit and the California Supreme Court and/or the Workers' Compensation Appeals Board of the State of California, Jointly or in the Alternative

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PETITION FOR WRIT OF CERTIORARI OR OTHER APPROPRIATE RELIEF

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CORPORATE DISCLOSURE

The corporation petitioner worked for between 1972 and 1985, when she was injured, was Alpha Graphix, Inc. It is not to be confused with the national printing franchise that spells it's name Alpha Graphics. Less than two months after she served them with *Serious and Willful Misconduct* charges, the corporation was sold to the majority owner's common law husband, and the name was changed to Skilset Graphix Corporation.

The insurance carrier that opposed petitioner from 1985 to date was Safeco. In 1993, when their present law firm took over, they began asserting a name change to General Insurance. General is a subsidiary of Safeco, smaller in size and with fewer assets. Since petitioner is basing her request for exemplary damages on the harsh, impersonal treatment she suffered under, at the hand of a large corporation, she is asking that her award be based on the assets of the same type of corporate entity.

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OPINIONS BELOW

The order and memorandum of the United States Court of Appeals for the Ninth Circuit (A1-A5 *infra*) affirming the district court's dismissal is not for publication. The orders of the District Court for the Central District of California (A6-A15 *infra*) dismissed the case. The California Supreme Court (A16 *infra*) denied review. The California Court of Appeals (A17 and A18 *infra*) denied review. The opinion and order of the Workers' Compensation Appeals Board (A19-A22 *infra*) denied Reconsideration. The Findings and Award, Findings and Order and Opinion by the Workers' Compensation Judge (A23-29 *infra*) is unreported.

JURISDICTION

The decision of the Court of Appeals was announced on August 29, 1994. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 10, 1995 (A2-A5 *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(a). The Court of Appeals had jurisdiction under 28 U.S.C., Section 1291. The District Court had jurisdiction under Title 28 United States Code, Sections 1331, 1332, 1343, 1355, and 1367.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article III, Section of the United States Constitution; Section 1, of the Fourteenth Amendment of the United States Constitution; Article III, Section 1 of the Constitution of the State of California; Article XIV, Section 4 of the Constitution of the State of California; California Code of Regulations, Sections 5208(j)(1)(B)(2) and 9727; and California Labor Code 5952. They are reprinted in Appendix (A30 to A33 *infra*).

STATEMENT OF THE CASE

Petitioner seeks review of the manner in which her her rights were violated and a decision was reached in her

workers' compensation suit; the unwillingness or inability of any state tribunal to objectively rule on these violations; the lower federal courts refusal to take jurisdiction of federal questions; and the effect these actions have on this Nation's Social Security system.

Petitioner suffered chemical injuries in March and April of 1985, at her job of 13 years, due to her employer's failure to comply with Occupational Health and Safety Administration (hereinafter "OSHA") standards. She still suffers severe and irreversible disability and impairments to multiple systems of her body, which are painful and often life threatening. She reacts to low levels of many common chemicals, which leaves her house bound most of the time. Her reactions do not respond to medication. Her health must be managed through exposure prevention and avoidance. Her symptoms have persisted for more than ten years and are considered permanent. Vocational Rehabilitate attempts have met with failure.

OSHA conducted an inspection of the premises beyond the statutory time, then conducted air sample tests after notifying the employer. The company was cited for violations. Their workers' compensation insurance rates increased dramatically and they changed carriers. Faced with a loss of premiums, their insurance company, Safeco (hereinafter "carrier") took an aggressive stance in an attempt to defeat petitioner's claim. They sent her to a toxicologist who wrote a report that concealed the cause and extent of her injuries and erroneously concluded that she suffered a pre-existing condition of non-industrial origin and could resume all usual, customary and full-time work activities; when in fact her health has never recovered to that point. Based on his report petitioner's benefits were terminated; and she was dismissed from her job. She was not represented at the time and was not aware of her right to have her own doctor in attendance during the carrier's doctor's exam. Carrier failed to advise her of this right. The employer withheld her profit sharing for six years, in an attempt to coerce her into dropping her workers' compensation suit.

In 1991 carrier offered a $10,000 settlement without medical benefits, which she declined. Her attorney had case load of 300 and refused to pursue her's any further. She proceeded in Propria Persona. In July of 1991 a Workers' Compensation Judge (hereinafter "WCJ") took jurisdiction and ordered her to be examined by an allergy/ pulmonary specialist. She asked instead to be seen by a toxicologist who could better explain the multitude of symptoms she suffered from the chemicals, but the WCJ denied her request. The WCJ's doctor impeached the carrier's Toxicologist and found petitioner's injuries to be 100% industrially caused; found no pre-existing condition; and diagnosed her as suffering from Environmental Illness, which is also known as Multiple Chemical Sensitivities. He advised the WCJ that the defendant's toxicologist's report was not probative.

Based on the confirmation that her injuries were work related, she filed a petition for *Employer's Serious and Willful Misconduct*, asking for enhanced benefits, within one year of discovery. She supported her claims with the OSHA report; *Department of Building and Safety* documents showing an absence of adequate ventilation and ongoing construction, and tests confirming an Asbestos content in the powder with which worked.

Between July of 1991 and June 30, 1992 a number of injustices took place that resulted in a limited disability rating and can only be interpreted as a violation of her Due Process rights guaranteed by the *Fourteenth Amendment of the Constitution of the United States.* There was a cooperative effort between the defense attorney and state employees to render a decision most favorable to the insurance carrier.

Information and Assistance Officers

As a Pro Per applicant, petitioner was required to discuss her case with a state employed Information and Assistance Officer (hereinafter "IAO") before trial. She was told not to argue with the WCJ or cite authorities in his courtroom. She was cautioned that most WCJs felt that Pro Pers caused extra work, and in order to

discourage them from representing themselves the above mentioned guidelines were strictly enforced. She was also told that the WCJ her case was assigned to was especially opposed to anyone who would "clutter the file" with motions or letters. She relied on this advise, but finds that adhering to these rules resulted in an extremely limited paper trail.

The IAO attempted to persuade petitioner to abandon her petition for *Reconsideration*, by claiming all she needed to do was oppose the carrier's *Reconsideration*. Had she followed his advice it would have appeared that she was satisfied with the WCJ's erroneous ruling, which was not the case. The IAO also impressed on her that it was more important to file a timely petition than to await production of transcripts. She ordered the transcripts and concurrently petitioned for *Reconsideration*.

Workers' Comp. Judge's Errors in Procedure

The WCJ ignored her inquiry about procedural protocol and refused to accommodate her disabilities' special needs in the courtroom[1]. He manipulated the presentation of evidence and prevented petitioner from fully presenting her case about Asbestos, the defense's misrepresentations, and a co employee who was similarly injured. He repeatedly expressed his impatience with petitioner, saying he had "other cases". Discussions about vital information took place off record. Petitioner was advised that she would have the opportunity to say things on record at a later date, but the time never came. *Hegglin v. Workmen's Compensation Appeals Board*, 4 C.3d 162, 164 and 165, found that improper restriction of

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1 A document entitled "Petition to Restrict Admittance to Courtroom" requested in part: "an order compelling all participants and other attendees to refrain from wearing any toxic, noxious, and/or odiferous substances..... which may cause reaction or discomfort to applicant.... It would greatly prejudice applicant's case if she were re exposed to any of the various substances, which now trigger adverse reaction. WHEREFORE, applicant requests that her petition for an order compelling all participants and other attendees to abide by the aforementioned restriction, the day of the trial, be granted."

the right to present evidence in rebuttal is a deprivation of the constitutional guaranty of due process of law. This court called into question the integrity of the fact finding process in *Chambers v. Mississippi*, 410 U.S. 284, when a court erred in excluding evidence it was decided that under the facts and circumstances of the case the rulings of the trial court deprived him of due process of law.

The WCJ allowed the defense a disproportionate amount of time to question the expert witness; he supplied documents to the defense, on which both sides based their *Reconsiderations*, three weeks before they were sent to petitioner; and he witnessed an act of intimidation by the defense attorney directed at petitioner, but made no attempt to intervene.

The WCJ's allergy/pulmonary specialist admitted that many aspects of petitioner's disease were beyond his field of expertise. A psychiatrist stated that his assessment did not encompass internal medicine or Toxicology factors, as they were out of his purview. *Raymond Plastering v. Workmen's Compensation Appeals Board*, 252 C.A.2d 748, 753, dictates that the referee or appeals board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence. Despite this case and petitioner's written and oral requests for a toxicological exam, the WCJ denied one.

The allergy/pulmonary specialist offered an opinion outside his realm of expertise when he called chemical injury a psychiatric malady. Four psychiatric doctors agreed fully or in part that petitioner is not paranoid, schizoid, and does not suffer delusions or hallucinate. Despite these seemingly clean bills of mental health, the WCJ chose to accept an allergy/pulmonary doctor's antiquated theory that chemical injury is a psychiatric illness. This act alone undermined her credibility and prejudiced her case in the eyes of every subsequent tribunal she approached. She should not be stigmatized by the WCJ erroneously labeling chemical injury as a psychiatric disease. Chemical injury is no more a

psychiatric disorder in a private citizen than it is in the fifty thousand Gulf War Veterans who are similarly disabled. On November 2, 1994, the President signed *Public Law 103-446* into effect. It recognizes chemical injury as a chronic, disabling illness to multiple systems of the body that does not respond to treatment; and provides compensation for the victims' impairment of earning capacity. In *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan,* 46 F.3d 958, 95 D.A.R. 1418, the Ninth Circuit heard an appeal where a man diagnosed with Multiple Chemical (Hyper)sensitivities had his benefits terminated after two years because his insurer had mischaracterized his as a mental illness. The court found it necessary to re-evaluate his case in light of the proper legal definition. The Workers' Compensation Appeals Board (hereinafter "WCAB") found his Multiple Chemical (Hyper)sensitivities to be a physical injury, not a "mental illness" or "functional nervous disorder".

The WCJ and the defense attorney worked together to suppress material evidence; they interrupted petitioner repeatedly so vital testimony did not appear in transcript; they had discussion about the case in petitioner's absence. It is worthy to note that the WCJ and defense attorney had formerly been co-workers.

The Defense Attorney

The defense attorney advised petitioner on record that the attending physician's report would not be considered if he were to testify to the findings in his reports, that it would be duplicative evidence and the WCJ would not allow it. She knew her statements were false. She made them to induce petitioner to go to trial without the doctor's testimony. Petitioner assumed the attorney had superior knowledge, as an attorney and officer of the court; relied on her advice and did not call her physician to testify; and was thereby damaged, in that the physician's oral testimony did not go on record.

The attorney made numerous misleading remarks on record. In *Garden Grove School District v. Hendler,* 63 C.2d 141, 143 the court decided that counsel had

committed error by (his) prejudicial misconduct during the trial and that (his) misconduct was sufficient to show a miscarriage of justice; and a more favorable verdict would otherwise have been reached.

Workers' Comp. Judge's Errors in Decision

Between July of 1991 when hearings began and June 30, 1992 when the WCJ rendered his decision, he took an extended vacation to the Orient. Upon his return his findings and award seemed to disregard petitioner's testimony and was almost verbatim what the defense's claims had been. Despite the state Constitution providing for "Adequate Compensation" (A31 *infra*) for workers' injuries, he awarded petitioner only a 25 1/2% disability rating, paying a lump sum benefit of approximately $13,700, meant to last a lifetime.

Labor Code 5952 (A33 *infra*) requires that the whole record be taken into account, but the WCJ took into consideration the opinion of only two of the twelve doctors who examined petitioner. No mention was made in reference to the treating physician's opinion, the only doctor who would see her when she was suffering her most excruciatingly painful and debilitating symptoms. The WCJ described only one of her physical injuries to the rating specialist and omitted the most debilitating symptoms. *Hegglin v. Workmen's Compensation Appeals Board*, 4 C.3d 162, 163, observed that it is improper to omit from its request for a disability rating... a full description of every factor of the applicant's... injury and condition. It recognized that Hegglin's two conditions were separate and individual physical abnormalities imposing different limitations upon his capacity to work. In the instant case petitioner suffers injuries to multiple systems, but was rated for only one physical injury. In *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, this Court held that the Board's findings of fact must be supported by substantial evidence on the record considered as a whole.

The WCJ failed to instruct the rating specialist to include petitioner's subjective symptoms. The Workers'

Compensation Rating Schedule (A35 *infra*) recognizes such symptoms as vertigo, headache, impairment of sense of smell, impairment of memory and concentration, irritability and fatigability all of which petitioner suffers to the point of incapacitation when exposed to chemicals. This testimony was part of the record, but the WCJ erred by not addressing it in his rating recommendations.

The *California Code of Regulations 9727* (A32-A33 *infra*) provides for compensation for subjective symptoms based on pain. Petitioner's testimony about her pain was part of the record, but the WCJ failed to consider it in his decision *Cotton v. Bowen*, 799 F.2d 1403 (9th Cir. 1986), stated in a Social Security claim, that it is improper as a matter of law to discredit excess pain testimony (that unsupported by objective medical findings) solely on the ground that it is not fully corroborated by objective medical findings.

An injured worker's ability to Compete on the Open Labor Market is the standard by which their injuries are measured. The WCJ was given sufficient information about petitioner's post-injury inability to complete on the open labor market, in her testimony and confirmed by her tax returns, but he erred by failing to consider that evidence

Petitioner's symptoms and complaints are consistent with the effects chemicals, with which she worked for up to nineteen years, are known to cause. Her claims were found credible by doctors in a variety of fields who recommended that the best treatment was prophylactic avoidance of chemicals to prevent exacerbation, aggravation or acceleration of symptoms. *Luchini v Workmen's Compensation Appeals Board* 7 C.A.3d 141, at 141, found it was the duty of the board to take whatever steps were necessary to insure that the award of permanent disability took into consideration the work restrictions imposed by the treating physicians; and there is compensable permanent disability to the extent that an industrial injury causes a decrease in earning capacity or in the ability to compete in the open labor market.

In the WCJ's opinion on decision he said he couldn't give the disability rating she sought,

> "Since applicant's numerous complaints cannot be substantiated by the medical evidence presented"

But he denied petitioner a fair opportunity to present her evidence, then he erred by isolating parts of the record that supported his contentions, and he erred again by ignoring other parts of the record that rebut or explain that evidence. *Lamb v. Workmen's Compensation Appeals Board*, 11 C.3d 274 finds that the substantial evidence standard is not met under those circumstances.

State Employed Court Reporters

Court reporters recorded what the defense attorney or WCJ said if they spoke when petitioner had the floor. But when petitioner objected to what the defense was saying her objections, in their entirety, did not appear in transcript. Vital points petitioner had checked off in her list of things she said in trial did not appear in the record.

Petitioner first ordered transcripts on July 16, 1992. She was told the reporters were backlogged. She learned that Los Angeles reporters produced "rush" transcripts for a fee. She asked for such an accommodation, but was refused. The supervisor insisted petitioner submit a second order at a later date, which she did on September 1, 1992. The second request alone would make it appear as if she had failed to request the transcripts in time for the WCAB's Reconsideration, which would not be true. Petitioner realized early on that her procedural due process rights were being violated in the proceedings, but was unable to articulate specific instances without the transcripts. She should not be precluded from relying on argument based on their content at this time, since their tardy production was controlled by the state. In *Re Labor Board*, 304 U.S. 485, 491, the Court found that jurisdiction of the court attached upon service of the petition for review and could not be defeated by the Board's failure to perform its statutory duty, which was to file the transcript.

In rendering his decision, the WCJ had access to only one transcript that had been altered and submitted by the defense attorney as evidence. It omitted one of the many side-effect steroids could impose on petitioner's health. This is significant because a worker is not expected to take medication that will further compromise their health. Petitioner objected to use of that transcript, but the WCJ did not delay his decision until he could refresh his memory with official transcripts. They were not available until three and six months after his decision.

Rating Specialist

Despite the court-appointed doctor repeatedly indicating that petitioner's injuries were not a typical, reaction to chemicals, the rating specialist limited her rating to a "typical restriction". *Nielsen v. Workmen's Compensation Appeals Board*, 36 C.A.3d 756, involved a worker who was found totally and permanently disabled due to her adverse reaction to copper and nickel. Since she could not be rehabilitated in one year, and there were few, if any occupations on the Open Labor Market that would not expose her to these materials, the customary rating was found to be arbitrary and unreasonable. It was not related to her disability or her diminished ability to compete on the Open Labor Market, nor was it supported by the evidence in light of the entire record.

In the instant case petitioner reacts to a greater number of substances; her reactions are painful and at times life threatening; it has been more than 10 years since she was able to compete on the Open Labor Market; but this information was not considered in her rating.

Insurance Carrier Acts In Bad Faith

The insurance carrier has acted in Bad Faith since 1985, when it authorized a medical examination by a doctor who wrote a fraudulent report about the state of petitioner's health and the cause of her injuries. Based on that report they stopped all benefits. Bad faith was also shown when failed to investigate the vast discrepancies between their doctor's report and the opinions of ten other

physicians. Although the WCJ awarded petitioner "past and further" medical benefits, the carrier unreasonably interpreted that to pay of only one dollar for every eight she spent. When she contested, they reevaluated her claim and then assumed responsibility for one of every sixteen dollars she had spent. Approximately 17 years ago she began working with Asbestos and is entitled to yearly Asbestos Worker Medical Surveillance exams per *Code of Regulations, Section 5208(j)(1)(B)(2)* (A32 *infra*), but carrier refuses to provide them.

EXHAUSTION OF REMEDIES

Workers' Compensation Appeals Board

Petitioner sought *Reconsideration* of the WCJ's decision from the WCAB, based on the WCJ making a decision in excess of his power; on the evidence not justifying the Finding of Facts; and the Findings of Fact not justifying his Order Decision or Award. She cited the *California Constitution, Article XIV, Section 4* (A31-A32 *infra*), based on denial of due process. She pointed out numerous misleading and erroneous statements in *Defendant's Petition for Reconsideration*, but the WCAB failed to address her concerns.

The WCAB erred in saying petitioner's *Request for Reconsideration* of *Employer's Serious and Willful Misconduct* was not timely, and in failing to consider ten of the 12 doctor's opinions. Although transcripts would better have enabled the WCAB to comply with the "whole record" requirement of the substantial evidence rule, they did not even consider the entire file that did exist at the time.

Without taking additional evidence or hearing oral argument, the WCAB simply adopted and incorporated the WCJ's reasons and denied petitioner's request for Reconsideration. *Fremont Indemnity Co. v. Workers' Compensation Appeals Board*, 153 C.A.3d 965, 971 found the WCAB in legal effect is a court... in exercising adjudicatory functions the commission is bound by the due process clause of the *Fourteenth Amendment to the*

United States Constitution to give the parties before it a fair and open hearing. The right to such a hearing is one of the rudiments of fair play assured every litigant by the *Fourteenth Amendment* as a minimal requirement.

Their decision was not supported by substantial evidence in light of the "entire record"; they departed from due process to arrive at a decision that was erroneous and unjust; they demonstrated an inability to objectively review another arm of the same administrative agency.

California Court of Appeals

Petitioner then approached the California Court of Appeals for Writ of Review to determine the Lawfulness of Opinion and Order Denying her Reconsideration. She claimed protection under *Section 1 of the Fourteenth Amendment of the United States Constitution* (A30 *infra*) and the protection and benefit of the provisions of *Section 4, Article XIV and Section 1, Article III of the Constitution of the State of California* (A31-A32 *infra*), in her *Petition for Writ of Review.*

She described her Employer's violations of the *Hazardous Substances Information and Training Act which* constituted *Serious and Willful Misconduct,* the WCJ's and defense attorney's acts, and carrier extreme and unreasonable Bad Faith in resolving her claim for which she sought compensation.

The court felt that since petitioner did not delay the WCAB Reconsideration until transcripts were prepared that she had waived transcript review. When the IAO advised her that she must file on time and reporters refused to meet those deadlines, as a Pro Se petitioner, she cannot be expected to discern which was most important to her case. Her intentions were never to waive her right to a full and fair review of her case. This is demonstrated by the fact that she had ordered the transcripts soon after the WCJ's decision. In *Caesar's Restaurant v. Industrial Accident Commission,* 175 C.A. 2d 850, 856, the same court found that waiver of a right cannot be established without a clear showing of intent to relinquish such right, and doubtful cases will be decided

against waiver; nor will a waiver be assumed if it is contrary to the intention of the party whose rights would be injuriously affected. In *Fay v. Noia*, 372 U.S. 391, 399, when petitioner in Pro Se failed to appeal, this Court decided it could not be deemed an intelligent and understanding waiver of his right.

California Supreme Court

Petitioner then asked the California Supreme Court for *Review* in order to secure uniformity of decision; to settle important questions of law; and to prevent a miscarriage of Justice. She addressed violations by her employer, the carrier, the attorney, the WCJ and she questioned the courts not reaching the merits of her case. She again claimed the protection of *Section 4, Article XIV and Section 1, Article III of the Constitution of the State of California*, and *Section 1 of the Fourteenth Amendment of the Constitution of the United States*, and asked for the benefit of due process. They too failed to hear her case.

However ineptly, the federal questions were raised it was done in a timely manner. In *Hughes v. Rowe*, 449 U.S. 5, 9, this Court stated that Pro Se complaints, however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers.

The state was given an ample opportunity to consider the applicability of state statutes in light of the constitution, but failed to rule on them. Refusal of the California Supreme Court to take jurisdiction is not considered a decision on the merits. In *Fay v. Noia*, 372 U.S. 391, 422, the Supreme Court of the United States said that the state doesn't get the last say when it misconceived a federal constitutional right.

Federal District Court

Since Petitioner's case wasn't exclusively against the WCAB, and it involved federal questions, it appeared that the District Court was the appropriate forum in which to be heard. She relied on the provisions of *Title 28 of the United States Code, Sections (hereinafter "U.S.C.") 1331 and 1343* and approached that court in a good faith belief

that they had jurisdiction. She advised them that she had been deprived of Equal Rights; she claimed the protection and benefit of California's workers' compensation system, *Labor Code,* rules governing the carrier; and she cited *The Americans with Disabilities Act.* She claimed Equal Protection that other people with subjective symptoms enjoy; that chemically injured mine and factory workers have; that workers are given in typically Male jobs; and from the Los Angeles District Attorney to help in prosecuting the carrier, their doctor and the attorney for their fraud.

She attempted to bring two class action suits for failure to advise injured workers' of their right to have their own doctor in attendance during a carrier's exam, and for the favorable treatment the defense attorney received from this particular WCJ. Since petitioner is not an attorney she asked that the class actions be dismissed without prejudice.

The District Court dismissed the entire case saying this Court would have jurisdiction and citing *D. C. Court of Appeals v. Feldman,* 460 U.S. 462, 482, to support its Order. *Feldman* did not appear to resemble the instant case in that petitioner is not challenging a regulatory rule. In his dissenting opinion in *Feldman* Justice Stevens observed that the District Court has jurisdiction over a claim that rules have been administered in an unconstitutional manner, which is petitioner's claim.

She understood this Court has jurisdiction to review state court judgments for "errors in federal law". Since no state courts had ruled on federal law, no error in federal law or review thereof appeared to be possible.

She was also told this Court would have jurisdiction to review a "final judgment by the highest court" in a state, but the WCAB did not appear to be the "highest" court in California and California supreme and appellate court's refusal to reach the merits did not appear to be a "judgment" of any type, final or otherwise.

The defense erroneously asserted that state and federal matters were so inextricably intertwined that

federal court could not take jurisdiction, but in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472, the Ninth Circuit ruled that matters could only deemed "inextricably intertwined" when there was a full and fair opportunity to litigate them in state court. Where the state court demonstrated an inability of unwillingness to protect federal rights federal courts were not precluded from taking jurisdiction. In the instant case the WCJ avoided the OSHA issue; no subsequent court has held a hearing based on violations of federal rights, diversity jurisdiction or OSHA violations. In *Wood v. Orange County*, 715 F.2d 1543, 1547, the Eleventh Circuit found that when a plaintiff is not given a reasonable opportunity to raise federal claims in the lower court, the district court has jurisdiction under *Title 28 U.S.C., Section 1331*, lest they be deprived any forum, state or federal, to raise constitutional claims.

If this is in fact the proper court in which to be heard petitioner asks that she not be penalized for having mistakenly approached the lower court before petitioning this Court. A plain English reading of *Title 28 U.S.C. 1331 and 1343;* and *Feldman* led her to file her case in the district court. In *Bradford Electric Co. v. Clapper*, 284 U.S. 221, 224, this Court held that there is no ground for concluding that it was the intent of the Congress to penalize a party by depriving him of a right granted because he had made a mistake in asserting a right not granted.

When no defendants responded to her complaint, and the carrier changed law firms, petitioner amended it to join the defense attorney. When the carrier attempted to pass the blame of their offenses onto a smaller subsidiary, petitioner felt they were attempting to perpetrate some sort of fraud and she leave to supplement her complaint based on her suspicions, and on diversity pursuant to *Title 28, U.S.C. 1332*, and later for their Bad Faith. In two Bad Faith actions, *Safeco Insurance v. Mirczak*, 662 F.Supp 1155, and *Kaufman v. General Insurance Company of America*, 192 F.Supp. 238; defense was a Washington corporation under either name. Carrier's

diversity is not defeated by the presence of other parties, as found in *Kalik v. Allis-Chalmers Corp.*, 658 F.Supp. 631, because there is an independent basis for federal jurisdiction over other defendants, the fact that some are not diverse to plaintiff, does not destroy diversity jurisdiction over defendants.

The WCAB responded beyond the statutory time and claimed Eleventh Amendment immunity. Petitioner later asked for leave to join the WCJ for his violations of *Title 42, U.S.C. 1981(a), 1983, 1985(2) and (3) and 1986.* His joinder was timely in that it was brought within 120 days of filing the complaint and according to *Federal Rules of Civil Procedure 15(c)(3)(B)* he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. His successor is named herein in the event his presence is necessary in his official capacity.

The case was dismissed without Leave to Amend, Supplement or joinder. This Court found in *Hughes v. Rowe*, 449 U.S. 5, 10, that Pro Se *Complaints* should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The Court's Order erroneously made reference to a *Second Amended Complaint*, which at the time did not exist.

Petitioner attempted to learn rule specific to Judge Baird's courtroom, but was told they would be sent to her when a trial date was set. On August 27, 1993 she received an order dismissing her case which lacked an "Entered" date. Believing time to file a *Request for Reconsideration* ran from the "file" date, petitioner served her *Reconsideration* by mail on all parties and the court on September 3, 1993. Two weeks later the court called to advise her it was their custom to accept papers directly without going through the clerk's office and invited her to submit a declaration as to the date her *Reconsideration* was filed, which she did. Timely filing was confirmed by the carrier when it stated in its *Opposition to Plaintiff's Motion for Reconsideration* (page 6, lines 3-5) :

"On September 7, 1993, counsel for defendants received Wilson's motion for reconsideration of the court's order of dismissal."

Ninth Circuit Court of Appeals

Petitioner appealed to the 9th Circuit and asked for de novo review. They misconstrued the date the district court *Reconsideration* was filed and erroneously treated it as a Motion pursuant to *Federal Rule of Civil Procedure 60(b)*, which would limit review to "abuse of discretion " only. The Ninth Circuit found in *Floyd v. Law*, 929 F.2d 1390 that any question which has been presented to the federal district court for ruling and which has not thereafter been waived or withdrawn is preserved for review. Petitioner's *Reconsideration* was filed in a timely manner, and she neither waiver nor withdrew any allegations.

They too relied on *D. C. Court of Appeals v Feldman* 460 U.S. 462, 482, to refuse jurisdiction saying that the United States Supreme Court would be the appropriate forum in which to be heard. Although petitioner had requested that her case be transferred to the proper court, pursuant to *28 U.S.C 1631*, no transfer was made.

In their opposition the carrier mischaracterized the gist of petitioner's complaint by erroneously claiming it is based only in state law; that petitioner is questioning the validity of a state statute; that the district court is asked to be an appellate court; by failing to recognize that her *Motion for Reconsideration* stayed the time to appeal; by misadvising the court as to what issues petitioner sought review of; and by stating that she sought review for abuse of discretion. Her timely *Reply* pointed out these discrepancies, but it had no influence on the court's decision.

On August 29, 1994 the court rendered their decision, but on September 2, 1994, they notified petitioner of a case to which she was not a party. She immediately called the court to learn if a decision had been made on her case. The switchboard was closed and

petitioner learned from the Pasadena office that their computers were down. After the long holiday weekend, she called the clerk on September 6, 1994, and was faxed a copy of the decision in her case. Later she was advised that the court would not make any changes to reflect tardy notification Since she had already sought and been given an extension due to the Northridge Earthquake, she thought it prudent to heed their warning that "further extensions would be looked on with disfavor" and responded within six days of receipt of decision.

Her *Petition for Rehearing en Banc* was to maintain uniformity in its decisions; to address a question of exceptional importance; because the opinion expressed directly conflicts with another court of appeals and substantially affects a rule of national application; and because material points of fact and law were overlooked or misapprehended in the decision. She later advised the court that *Public Law 103-446* had passed; that new OSHA laws were instituted in 1994; and she made reference to other circuits working to see that OSHA standards were enforced. On January 10, 1995 the same panel denied petitioner's petition for rehearing and rejected her suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT/PETITION

This case is but one example of California's practice of shifting the burden of their disabled from insurance companies to the nations' Social Security system. The acts and omissions of the state employees and the defense attorney were deliberately designed to suppress evidence and create a record most favorable to the carrier, knowing the extent of petitioner's injuries, and aware that they was helping to create a false record. They did to benefit the industry that was responsible for providing gratuities and job security to people in their positions. Their intentions were to damage petitioner. She was damaged by their actions.

The WCJ was in a position of authority with the power to protect petitioner's rights, but joined in a

conspiracy to defraud her of her right to a fair trial and then deprived her of the benefits such a trail would have produced. His decision was arbitrary and unreasonable and not based on the entire record. He departed from Procedural Due Process and failed to provide Equal Protection under the law pursuant to the *Fourteenth Amendment of the Constitution of the United States,* to derive a highly prejudicial and clearly erroneous decision. His were not harmless errors.

No state or federal court has heard petitioner's case on the merits of any federal issues: not OSHA, procedural due process, equal rights, equal protection or the Bad Faith of a diverse corporation.

Maintain Uniformity of its Decisions

The Ninth Circuit has heard the following cases: Ortiz v. Bank of *America National Trust and Savings Association,* 852 F.2d 383 (9th Cir. 1987) violation of civil rights and good faith; *Miller v. Fairchild Industries Inc.,* 885 F.2d 498 (9th Cir. 1989) for retaliatory discharge, breach and fraud; *Eldridge v. Felec Services, Inc.,* 920 F.2d 1434 (9th Cir. 1990) retaliatory discharge for filing a workers compensation claim; and *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan,* 46 F.3d 958, 95 D.A.R. 1418 wherein a man was diagnosed with Multiple Chemical (Hyper)sensitivites.

Conflict Between Courts of Appeal

In the following, other circuits took jurisdiction over cases similar to petitioner's: *Hamed v. General Accident Insurance Company of America,* 842 F.2d 170 (7th Cir. 1988) seeking punitive damages for Bad Faith; *Merrit v. Bethlehem Steel Corporation,* 875 F.2d 603 (7th Cir. 1989) for OSHA violations in the work place; and *Middleton v. Dan River, Inc.,* 834 F.2d 903 (11th Cir. 1987) for fraudulently concealing the nature and extent of claimant's lung condition.

Traditional bars to federal involvement in workers' compensation cases do not apply where an applicant's constitutional rights have been violated; or when injury

has resulted from non-compliance with federal OSHA standards; or when diverse carriers act in bad faith.

Issues of Exceptional Importance

During the summer of 1992 the state of California was out of money. Employees were being paid with checks they could not cash. They staged walk outs, work slow downs and manned picket lines during work hours. Budget problems imposed pressure on state workers to create an atmosphere that would cater to the insurance industry. One IAO told petitioner that his job would be eliminated if "something wasn't done to appease insurance companies". Under such pressure, judges are transformed from neutral parties, capable of rendering a fair and just decision, into the injured worker's adversary. State employees who feel that their jobs are being threatened intentionally do their part to deprive injured workers of adequate compensation. They act with malice, oppression and reckless disregard of the negative impact their actions have on injured workers who suffer from inadequate compensation little or no medical attention for the special needs imposed by their work related injuries.

On October, 27, 1993, a Los Angeles, Times article said that (Governor) Wilson threatened to veto the budget that year if he did not get the changes he wanted in Workers' Compensation. On October 24, 1994 the Department of Industrial Relations issued a news release saying they had reduced workers' compensation insurance rates by 31% (A36 and A37 *infra*). Their only objective is to improve their bottom line, with little or no concern for the health and well-being of injured workers. There exists an incompatibility between state interests and the federally conferred right to Procedural Due Process.

State Transfers Financial Woes to its Disabled

Petitioner has searched out other injured workers and learned they too believe their rights were violated in WCAB hearings, resulting in inadequate compensation for the extent of their injuries. They describe the procedures in terms such as "railroaded", "sham" and

"kangaroo court". Off the record attorneys' agree. This is not a result of subtle or subconscious evasion of federal rights, nor simply poor judgment on the part of one WCJ. It is a cooperative effort between the state and powerful insurance companies to better their own positions at the expense of the injured, the disabled, the integrity of Social Security and future recipients of Social Security funds. Some injured are forced to rely exclusively on Social Security Disability and in many case Supplemental Security Income (hereinafter "SSI").

It is in the insurance industry's best interest to methodically destroy Social Security, since its demise will ultimately force everyone to purchase private insurance for their retirement and/or disability. They are not above such despicable behavior, in *United States v. Blue Cross Blue Shield of Michigan*, 726 F.Supp 1517, the federal government engaged in a five year long battle to recover Medicare funds. Three months ago an out of court settlement for $24 million was reached.

Injured workers, as a class, are an exceptionally vulnerable target, from whom to deprive money. They have no easy and effective way to assert their rights. Most suffer such great financial burdens they cannot afford decent legal representation to pursue a workers' compensation appeal. Often they lack the financial means, physical stamina and legal know how to present their own cases Pro Se; or to rally, unite and be heard otherwise. The most egregious aspect is that the carriers have the full cooperation of state and local governments and the courts in perpetrating their Fraud and Bad Faith.

When petitioner sought help from the California Insurance Commissioner, she was told they can help her with any insurance matter, except workers' compensation. The Los Angeles District Attorney turned their backs on her plea for help. Recently it came to her attention that the District Attorney's department that investigates insurance crimes, is the recipient of furniture, works of art, a law library and a reduced lease rate in plush offices, out of the generosity of a law firm that defends workers'

compensation insurance carriers. This appears to be a conflict of interest, but a plausible explanation of why the department refuses to give petitioner equal protection under the law that the insurance companies enjoy.

Chief Justice of California's supreme court, Malcolm Lucas is reported to have received between $11,000 and $18,000 in vacation benefits from the insurance industry. In June of 1992, shortly before the time petitioner's case was presented to that court, he spent six days in Hawaii as a guest of a group of California lawyers who defend insurance companies. His record reflects a bias in favor of the carrier petitioner opposes. When he sat as a district court judge he granted summary judgment to them in a Bad Faith action entitled "*Beckham v. Safeco Insurance Company of America*, 691 F.2d 898". The circuit court found that a genuine dispute as to a material fact did exist and that Safeco had breached its duty to attempt in good faith to effectuate a fair and equitable settlement. Such behavior erodes the public confidence in the integrity and impartiality of the judiciary.

Petitioner knew when the WCJ rendered his decision, that he was not acting within the law, but she was not aware of his character in general. Now it is a matter of public record that the same man has been indicted for two felony counts of sexual battery and false imprisonment of an attorney in his chambers. This is not an act of a rational person whose decisions from the bench should go without review. His felonious conduct should put his judgments at issue, both inside the confines of his chambers and in the courtroom, yet to date almost three years have passed without his word being questioned. When he refused to cooperate with a departmental investigation, he was dismissed. His absence from the bench however, does not moot the issue. Petitioner is still suffering with inadequate compensation and ineffective health care for her injuries. Other injured workers are still struggling with the results of unfairly adjudicated claims. Other WCJs are still violating due process in order to reach decisions favorable to insurance carriers.

By this September California will have received almost $61 million in *Operation Gatekeeper* to monitor its southern boarder and pay for illegal aliens in our prison system. In November of 1994 state voters expressed their wish to transfer the cost of illegal aliens' health care, schooling, and other social services to the federal government when they voted *Proposition 187* into law. But the state has a hidden agenda to shift more of its financial responsibilities to the federal government's shoulders.

FBI Uncovers Corruption in California's Insurance Industry and Legislators

When petitioner first began the appellate process, she was focused on her case alone. Recently she became aware of the FBI's seven year long investigation into corruption in California's state legislature concerning workers' compensation and other insurance matters. The Sacramento United States Attorney General's office has prosecuted more than a dozen political figures involved in accepting bribes from workers' compensation and other insurance industry special interests groups, in exchange for legislative action in favor of the concerns they represent. The problems transcend political party lines.

Influencing the state judiciary to deny adequate compensation benefits, is an effective way to achieve more immediate results, and circumvent the slow arduous task of rewriting laws. When the WCJ's breach their duty to reach decision according to the state constitution, code, case law and rating schedule, neither the WCAB nor the higher state courts have shown an ability to objectively rule on these violations. In *Gibson v. Berryhill*, 411 U.S. 564, 570 this court found that when a serious question of personal financial stake was raised, and a Board was so biased as to deprive plaintiffs of due process of law, that federal abstention from intervention in state proceeding is inappropriate.

It's time for the federal government to step in and tell the state of California that it can no longer cater to insurance companies by denying injured workers a right

to a fair trial in order to increase the insurance companies earnings and meet the state's budget. With all the corruption that's been exposed in Sacramento, it would be naive of anyone to think that similar behavior hasn't filtered down through the ranks to the agency that administers the law, to adversely affect injured workers. It appears that this case would be a natural extension of the FBI's Sacramento investigation.

DEMISE OF SOCIAL SECURITY, A MATTER OF NATIONAL CONCERN

Statistics show that California is comprised of approximately 12% of the nations' population (A34 *infra*). However the number of SSI recipients in the state is approximately 16% of the total number of recipients nationwide (A34 *infra*). Worse yet, the amount of SSI money paid to Californians is approximately 23% of that paid nationwide (A34 *infra*). So grossly disproportionate a figure can be attributed to the fact that Social Security funds are the primary source of income for California's disabled, when workers' compensation benefits would be, if paid according to law.

The law provides for Social Security to supplement injured workers' disability payments, up to 80% of their earnings at the time of their injury. In the instant case, petitioner's only source of income is Social Security. She receives a mere 1/3 of what her income would be today, based on cost of living increases over the past decade. If she had been awarded workers' compensation benefits for the full extent of her injuries, plus enhancements for the *Employer's Serious and Willful Misconduct* and penalties for the carrier's delays, it would have eliminated any need for monetary benefits from Social Security.

Extreme and Unreasonable Handling of Claim

Insurance companies have a predilection to advance their economic interests over the injured workers' right to compensation. They stop benefits early in the proceedings then use their position of power as leverage to force injured workers to accept inadequate compensation. In

California they know they do not have to act in Good Faith. They are confident that WCJ's will adjudicate claims most favorable to the carrier; they know their gifts can influence D.A.'s and judges alike to turn a blind eye to obvious infractions of the law; they know workers' compensation attorneys carry 300 cases at a time and will not assist in appeals; they know appellate lawyers will handle workers compensation claims only on rare occasions, and for exorbitant fees that most injured workers are unable to pay; they know California appellate and supreme courts can refuse to adjudicate case without reaching its merits; they know there is no remedy at law within the state that will be used against them; and they that a Pro Se petitioner's chance of being heard by this Court is less than four percent. Armed with this knowledge carriers are confident that they will prevail in their Bad Faith without any fear of reprisal.

The WCAB and the carriers pursue a conscious course of conduct designed to reach a decision more favorable to the carrier than the facts otherwise warrant. State judges fail to assume a neutral position in the administration of workers' compensation law. Instead they take an active role in defeating injured workers' claims. They are openly rewarded with gifts then act favorably toward their source. They experienced a cessation of income when the state was in financial crisis. Now they act out of evil motive, self-serving interests, and personal gain. The WCAB has insulated itself from any effective form of review or reprisal. Neither state nor local government is capable of protecting the rights of injured workers. Where the state fails, the duty to protect becomes that of the federal government.

THE QUESTIONS PRESENTED ARE IMPORTANT

When people accept employment in this state they are told that if they are injured on the job they will be compensated for those injuries. They are also told if their injuries are a result of their *Employer's Serious and Willful Misconduct*, that they are entitled to a 50%

premium to more fully compensate them. They expect those laws to be enforced and rightfully so. They are not warned that the insurance companies will try to conceal the industrial cause and extent of their injuries. If petitioner had known this she would have had her doctor in attendance at her examination, but the carrier breached their duty to advise her of that right and now they have benefited from that failure for ten years. If she had known that the carrier and WCAB would work cooperatively to unjustly defeat her claim, she would have carried her own disability insurance policy, she is conscientious about other coverage. If most workers knew of the manner in which the carrier in the instant case handled petitioner's claim, they too would carry their own policies, and there would be no need for California's workers' compensation system, as it exists today.

Likewise workers across the nation are confident that if they someday need to rely on Social Security funds, that the federal government will have protected that money and Social Security will be solvent when they retire or become disabled. These funds will not be available if private insurance companies are allowed to continue to prematurely drain them. The average worker cannot be expected to have sufficient investments set aside to tide them over during such times, when they have been led to believe during the many years they worked that Social Security will be there to draw on.

Provident Life and Accident Insurance Company v. Waller, 906 F.2d 985, 993, discusses the elements of unjust enrichment and quasi contract saying that (1) a plaintiff must show that he had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society's reasonable expectations of person and property would be defeated by nonpayment.

In that light (1) California's workers reasonably anticipate being compensated if they are injured and disabled on the job; (2) defendants' respective purposes are to see that carriers provide that compensation; and (3) Nationwide contributors to Social Security have

reasonable expectations of the government protecting Social Security funds so that money being available if and when they need to depend on it.

Fair and just resolution of this case would not only solve the problems confronted by one injured worker, but it would prevent similar injustices from damaging other injured workers in the state of California; it would put insurance companies on notice that Bad Faith behavior will not be tolerated; it would serve to bring attention to the fact that chemical injury is suffered not only in battle, but in private industry also; it would demonstrate the importance of complying with OSHA regulations; but most important, it would stop the premature depletion of Social Security funds which now occurs strictly for the respective benefits of the insurance industry and the state of California. The importance of the integrity of this nation's Social Security system far outweighs one state's quest for financial stability. If writ is not granted the state will continue to act in a way that undermines the Social Security program, now on the eve of a post-war generation reaching retirement age.

OSHA laws are legislated for the safety and sell-being of this nation's working class. to avoid enforcing the *Employer's Serious and Willful Misconduct* portion of this case send a message to industry that they need not comply with the law; and to the labor force that their government is not their to protect them. *Title 28 U.S.C. 1355* gives the district court original jurisdiction to recover such benefits.

Petitioner is seeking exemplary damages based on a percentage of the parent corporation's net worth. She is also asking for damages from the WCJ. She prays that the Court find this to be reasonable considering the length of time since she first suffered her industrial injuries, and the reprehensibility of a carrier acting in Bad Faith against someone who is disabled and least capable of fighting back in a court of law. Carrier's tremendous wealth would allow it to absorb the loss with little or no discomfort. If punitive are not large enough, they are not

likely to discourage further wrongful conduct., rather they would be viewed as a cost of doing business

Petitioner would ask that a portion of that amount be paid directly go to Social Security to offset past and future payments to disabled workers' whose support should have been borne by California's insurance carriers and whose cases can no longer be litigated. She would also ask that if the class-actions are pursued and won that a proportionate amount go to the members of the class. And finally she asks that a fund b established to research chemical injury in the Gulf War Veterans and their offspring who are exhibiting severe genetic defects. Treatment in the early stages may alleviate some of the financial burden the federal government will otherwise have to shoulder in the future.

Before the Los Angeles County dependency courts moved to a building petitioner's health could not tolerate, she volunteered a few days each month escorting abused, abandoned and neglected children into court; discussing their concerns; and generally keeping their cases from "slipping through the cracks". Petitioner prays that this Court not allow that sort of fate to befall her case.

CONCLUSION

For the foregoing reasons, petitioner prays:

That this Court adjudicate all matters, or

1. That a Writ of Certiorari issue from this Court to the Ninth Circuit Court of Appeals for impartial De Novo adjudication of all matters.

2. That a Writ of Certiorari issue to the California Supreme Court to bring up the the record from the California Workers' Compensation Appeals Board; and

3. That petitioner have such additional relief and process as may be necessary and appropriate.

Dated: April 10, 1995 Respectfully submitted,

Wilma Wilson

Petitioner in Pro Se

VERIFICATION

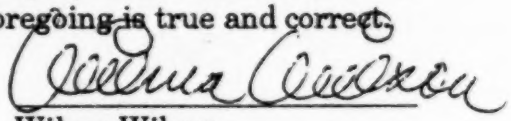
STATE OF CALIFORNIA)
) C
COUNTY OF LOS Angeles)

I, the undersigned, certify and declare that I have read the Petition and know its contents. I am a party to the action.

The matters stated in the document described above are true of my own knowledge and belief except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Executed on April 10, 1995, at Van Nuys, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Wilma Wilson,
Petitioner in Pro Se
5544 Calhoun Avenue
Van Nuys, CA 91401
818 787-4340

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 93-56687

WILMA WILSON,

Plaintiff-Appellant,

v.

WORKERS' COMPENSATION APPEALS BOARD, State of California; ALPHA GRAPHIX, INC.; SAFECO INSURANCE, CO.; DORIS NISTLER,

Defendants-Appellees

Appeal from the United States District Court
For the Central District of California

Filed January 10, 1995

ORDER

Before: WALLACE, Chief Judge; HUG, and RYMER, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

Docketing ID:4157449723 Sep 06'94 9:29 No.001 p.01

U. S. COURT OF APPEALS for the NINTH CIRCUIT
121 SPEAR STREET, ROOM 205
P.O. BOX 193939
SAN FRANCISCO, CA 94119-3939

FAX TRANSMITTAL COVER SHEET

Date: 9-6-94

To: Ms. Wilson

Office:

Fax #:

From: Unit

Telephone Number 415-744-

Number of Pages 5 (Including cover sheet)

Message:

If any part of this transmission fails to reach you, please call the sender immediately at the above indicated phone number.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 93-56687

WILMA WILSON,

Plaintiff-Appellant,

v.

WORKERS' COMPENSATION APPEALS BOARD, State of California; ALPHA GRAPHIX, INC.; SAFECO INSURANCE, CO.; DORIS NISTLER,

Defendants-Appellees

Appeal from the United States District Court
For the Central District of California
Lourdes G. Baird, District Judge, Presiding

Submitted August 23, 1994**
Filed August 29, 1994
Faxed to Plaintiff/Appellant September 6, 1994

MEMORANDUM*

Before: WALLACE, Chief Judge; HUG, and RYMER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provded by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Wilma Wilson appeals pro se the district court's denial of her motion to reconsider the district court's dismissal of her action for lack of subject matter jurisdiction. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and we affirm.

We review the denial of a motion to reconsider under Federal Rule of Civ. P. 60(b) for abuse of discretion, and we will reverse "only upon a clear showing of abuse of discretion." *Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989). We construe Wilson's motion to reconsider as a Rule 60(b) motion because it was filed more than ten days after entry of judgment. *See* Fed. R. Civ. P. 60(b) & 59(e). An appeal from a denial of a Rule 60(b) motion does not bring up the merits of the underlying judgment for review. *Molloy*, 878 F.2d at 315.

A motion for reconsideration may be brought under Rule 60(b) if the moving party can show (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or other misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from operation of judgment. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Here, Wilson sought reconsideration based on "newly discovered evidence" which she asserted established diversity jurisdiction. The district court denied the motion, finding that Wilson's underlying action essentially sought federal review of a state court judgment and that despite Wilson's newly discovered evidence, the district court lacked authority to conduct such a review. We agree.

A United States district court as a court of original jurisdiction, "has no jurisdiction to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986) (citing, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983)). The proper place to seek such review is the United States Supreme Court. 28 U.S.C. Section 1257; *McNair*, 805

F.2d at 890. "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *McNair*, 805 F.2d at 891. the test is whether the claims brought in federal court are "inextricably intertwined" with the state court's decision, such that a decision by the federal court would require reviewing the propriety of the state court decision. *Id.* at 892 (citing *Feldman*, 460 U.S. at 483-84 n. 16).

Here, Wilson alleged evidentiary errors and constitutional violations connected with her state workers compensation proceedings. Specifically, she alleged that the administrative law judge failed to give her a fair trial because he did not give proper consideration to her symptoms, made erroneous evidentiary rulings, and misapplied the relevant law. Wilson asked the district court to remand her action to the Workers' Compensation Appeals Board for further proceedings. We agree with the district court that it lacked authority to conduct a review of Wilson's action. Accordingly, we find no abuse of discretion in the district court's denial of Wilson's motion for reconsideration based on her alleged discovery of diversity jurisdiction. *See Molloy*, 878 F.2d at 315.

Wilson also appeals the district court's denial of her post-judgment motions to file an amended complaint and to supplement the complaint. Because we agree with the district court that amendment in this case would be futile, we find no abuse of discretion in the district court's denial of Wilson's post-judgment motions. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir 1987) (district court has discretion to grant or deny motion for leave to amend the complaint).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
Central District of California

No. CV 93-3119 LGB

WILMA Wilson,

Plaintiff,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE State of California; ET AL.,

Defendants

Filed November 1, 1993

Entered November 4, 1993

ORDER RE: MOTION FOR RECONSIDERATION AND LEAVE TO AMEND; MOTION TO SUPPLEMENT THE COMPLAINT; REQUEST FOR SANCTIONS

BACKGROUND

Plaintiff in this case (Wilma Wilson) filed an amended complaint on June 24, 1993 for various causes of action arising out of her unsuccessful appeal of a decision made by the California Workers' Compensation Appeals Board. The suit was brought against the following Defendants:

1) The California Workers' Compensation Appeals Board ("WCAB");

2) Alpha Graphix, Inc. (Plaintiff's former employer);

3) General Insurance Co., sued erroneously as

"Safeco, Insurance Co." (Alpha's insurer); and

4) Doris Nistler (counsel for Defendants in the workers' compensation proceedings).

On July 14, 1993 Defendants Alpha Graphix, General, and Nistler (hereinafter the "Alpha Defendants"), moved to dismiss the case. On July 19, 1993, Defendant WCAB also moved to dismiss. On August 27, 1993 this Court issued an order dismissing the case with prejudice.[1] The Court found that plaintiff failed to state a claim upon which relief could be granted, see Fed. R. Civ. P. 12(b)(6), and that the Court lacked subject matter jurisdiction over the action, see Fed. R. Civ. P. 12(b)(1).

The Court found that it lacked subject matter jurisdiction based on the rule stated in *D. C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." The Court found that Plaintiff failed to state a claim against the Alpha Defendants on the ground that her complaint "literally fails to state actual legal claims." The Court found that Plaintiff failed to state a claim against WCAB on the ground that the Eleventh Amendment to the United States Constitution prohibits lawsuits against a state and its agencies unless the state consents, and Plaintiff had failed to show that California had consented to her lawsuit against WCAB.

Now before the Court are Plaintiff's motion for reconsideration and leave to amend her complaint, Plaintiff's motion to supplement her complaint, and the Alpha Defendants' requests for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule

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[1] Dismissal was based on Rule 12(b)(6) (failure to state a claim), and, alternatively, Rule 12(b)(1) (lack of subject matter jurisdiction). Although the order was silent as to whether dismissal was with or without prejudice, if Rule 12(b)(6) motion to dismiss for failure to state a claim is granted, the dismissal is with prejudice unless the order specifically provides otherwise. *See Carter v. Norfolk Comm. Hosp. Ass'n*, 761 F.2d 970, 974 (4th Cir. 1985). Therefore, dismissal was with prejudice

11"), Local Rules 7.19 and 27.1, and this Court's inherent powers.

DISCUSSION

A. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff moves for reconsideration of this Court's August 27, 1993 Order pursuant to Local Rule 7.16, which states:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence [sic] could not have been known to the party moving for reconsideration at the time of decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider facts presented to the Court before such decision.

Plaintiff first argues, pursuant to subsection (a) of section 7.16, that she has discovered a new fact that indicates that this court has subject matter jurisdiction over this cause of action. Plaintiff states that she has discovered that General is a Washington Corporation, not a California corporation, and that therefore diversity jurisdiction exists. (Plaintiffs' Motion for Reconsideration and Leave to Amend her Complaint (Plaintiff's Motion), at 4:3-16.) The Alpha Defendants counter that even if General is a Washington corporation, diversity still does not exist in the Plaintiff, Nistler, and Alpha Graphix are all citizens of California. (Alpha Defendants Opposition to Plaintiff's Motion, at 8:25-9:6)

What both parties fail to realize is that even if this court were to assume that diversity exists among all of the parties, such a finding would not overcome the holding in *D. C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), that "a United States District Court has no authority to review final judgments of a state court in

judicial proceedings." This holding applies whether or not the parties are diverse. In other words, the Court in *Feldman* did not find that a district court lacks federal question jurisdiction to review a final judgment of a state court in a judicial proceeding. The Court found that in such circumstances the district court lacks subject matter jurisdiction generally. Therefore, a finding that diversity exists among parties would not cure the jurisdictional defect.

But even further assuming that this court has subject matter jurisdiction over this action, Plaintiff has nonetheless failed to show that she can present new facts or law indicating that she can state a claim upon which relief can be granted. This Court's August 27 Order was based on lack of subject matter jurisdiction, and, alternatively, Plaintiff's failure to state a claim upon which relief can be granted. For this Court to grant Plaintiff's motion for reconsideration, new facts or law would have to be presented that would overcome both bases of this Court's Order.

Plaintiff also grounds her motion for reconsideration on subsection (c) of Local Rule 7.16. She alleges that although she filed an opposition to the Alpha Defendants' motion to dismiss, "no mention of my arguments or the facts stated therein appeared in the Court Order." (Plaintiffs' Motion, at 4:19-23.) However, the fact that a party's pleading is not mentioned in a Court's Order does not amount to a "manifest showing of a failure to consider material facts presented to the Court," as is required by Rule 7.16.

Finally, Plaintiff argues, pursuant to subsection (b) of section 7.16, that a new fact has emerged since this Court's August 27 ruling. She states that the new fact is General's "latest refusal to comply with a court order and pay my medical bills; and their claim that what little they did pay was an 'overpayment.'" (Plaintiff's Reply to the Alpha Defendants' Opposition to Plaintiff's Motion, at 10:11-14.) Even if this fact has emerged since the August 27 Order, its existence would in no way change the

outcome of the Order.

For the foregoing reasons, this Court hereby DENIES Plaintiff's motion for reconsideration of this Court's August 27, 1993 Order dismissing Plaintiff's second amended complaint.

B. PLAINTIFF'S MOTION FOR LEAVE TO AMEND HER FIRST AMENDED COMPLAINT

In her opposition to the Alpha Defendants' and WCAB's motions to dismiss, Plaintiff requested that if this Court grants Defendants' motions, Plaintiff be granted leave to amend her complaint. This Courts' August 27 Order dismissing Plaintiff's complaint did not grant Plaintiff's request for leave to amend. Plaintiff now seeks leave of this Court to amend her complaint.

Plaintiff's motion for leave to amend is defective in several respects. First, when a court grants a rule 12 motion and dismisses the complaint with prejudice and without leave to amend, a Plaintiff who wishes to move for leave to amend must first file a motion for relieve from the judgment under Federal Rules of Civil Procedure 59(e) or 60(b) to reopen the case. *Glenn v, First Nat'l Bank in Grand Junction,* 868 F.2d 368, 370. Plaintiff has not filed a motion for relief from judgment or to reopen the case pursuant to rules 59(e) and 60(b).

Second, when a plaintiff seeks leave to amend by way of a noticed motion, "[a]n original and one copy of the proposed amended pleading shall be lodged as a separate document with [the] notice of motion." *Central District of California Local Rule* 3.8.1. Plaintiff has failed to lodge an original or a copy of the proposed amended complaint.

Finally, a party who seeks leave to amend by way of a noticed motion must set forth with particularity both the grounds of the amendment and the relief requested. Fed. R. Civ. P. 7(b)(1). Leave to amend may be denied if the grounds set forth are futile or legally insufficient. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988) (finding that "valid reasons for denying leave to amend include undue delay, bad

faith, prejudice, and futility," and basing its decision to deny leave to amend on the ground of futility.) A proposed amendment is futile "only if no set of facts can be proved under the amendment which would constitute a valid claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

In response to WCAB's argument that an amendment would be futile, Plaintiff first states that "I believe that the details in the court order (granting leave to amend) will assist me in composing a subsequent document more acceptable to this court." (Plaintiff's Reply to WCAB's Opposition to Plaintiff's Motion, at 7:14-16.) Plaintiff also again argues that this court has diversity jurisdiction. Id. at 7:21-23. Finally, Plaintiff suggests that if leave to amend is granted, Plaintiff would drop WCAB from the complaint and instead add Judge Feinstein (the WCAB judge who decided Plaintiff's workers' compensation claims). Id. at 7:25-8:14, 10:1-6.

None of these contentions indicate that if leave to amend is granted, Plaintiff will be able to overcome the subject matter jurisdiction impediment that stands in her way.[2] Furthermore, although by dropping WCAB and adding Judge Feinstein Plaintiff may overcome WCAB's 12(b)(6) motion, Plaintiff has offered no grounds for overcoming the Alpha Defendants' 12(b)(6) motion. In that Plaintiff has offered no grounds indicating that allowing her to amend her complaint would cure the defects in her second amended complaint, Plaintiff's motion for leave to amend her second amended complaint is hereby DENIED.

C. PLAINTIFF'S MOTION TO SUPPLEMENT HER FIRST AMENDED COMPLAINT

At the same time that she moved for reconsideration and for leave to amend her second amended complaint, Plaintiff moved to supplement her complaint pursuant to -

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[2] For the discussion of why Plaintiff's diversity jurisdiction allegation would not overcome the subject matter jurisdiction impediment, see section A, *supra*.

Federal Rule of Civil Procedure 15(d). Because this Court has already dismissed Plaintiff's second amended complaint and has denied her motion for reconsideration, there is no complaint to supplement, Therefore, this Court hereby DENIES Plaintiff's motion to supplement her second amended complaint.

D. DEFENDANTS' MOTION FOR SANCTIONS

The Court hereby DENIES the Alpha Defendants' request for sanctions pursuant to Rule 11, Local Rules 7.19 and 27.1, and this Court's inherent powers.

SO ORDERED.

Dated: December 16, 1993

/s/ LOURDES G. BAIRD

Lourdes G. Baird
United Stated District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
Central District of California

No. CV 93-3119 LGB

WILMA Wilson,

Plaintiff,

v.

WORKERS' COMPENSATION APPEALS BOARD ETC. ET. AL.,

Defendants

Filed August 27, 1993
No "Entered" Date
ORDER OF DISMISSAL

Plaintiff filed this lawsuit after the unsuccessful prosecution of her Workers' Compensation claims in California state courts. Plaintiff has sued the following Defendants:

1) the California Workers' Compensation Appeals Board (WCAB);

2) Alpha Graphix, Inc. Plaintiff's former employer);

3) General In. Co., sued erroneously as Safeco, Ins. Co. (Alpha's insurer)'

4) Doris Nistler (counsel for Defendants in the Workers' Compensation proceedings).

Defendants' have moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and Fed R. Civ. P. 12(b)(6).

1. Alpha Graphix, General Ins. Co.'s, and Doris

Nistler's Motion to Dismiss

Plaintiff's Amended Complaint literally fails to state a claim upon which relief can be granted, and fails to comport with the requirements of Fed. R. Civ. P.8 (which requires "s short and plaint statement of the claim showing that the pleader is entitled to relief"). Even when Plaintiff's amended Complaint is read in the light most favorable to Plaintiff, it is impossible to discern therein the articulation of an actual federal theory of injury and recovery.

While Plaintiff's Amended Complaint does refer at time to federal due process rights and civil rights, and while Plaintiff's Amended Complaint does set forth numerous allegations of wrongdoing, Plaintiff's Amended Compliant nonetheless literally fails to state actual legal claims. Pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 8, therefore Plaintiff's Amended Complaint must be DISMISSED as against these three Defendants.

Moreover, Plaintiff's Amended Complaint appears to seek federal review of the unfavorable outcome of her state Workers' Compensation claim. Plaintiff has previously unsuccessfully appealed the decision of the Workers' Compensation court in California state courts, including the California Court of Appeal and the California Supreme Court. See Defendants' Exs. 1-4.

It is settled law that a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in (the United States Supreme) Court." *D. C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). As the most comprehensive construction of Plaintiff's Amended Complaint reveals that Plaintiff is seeking review of the state court's judgment by a federal district court, Plaintiff's Amended Complaint must be also DISMISSED for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), as against these three Defendants.

2. WCAB's Motion to Dismiss

WCAB has properly moved to dismiss Plaintiff's suit on the grounds noted supra, namely, that the suit is

barred under the rule stated in *D. C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Thus, Plaintiff's Amended Complaint must also be DISMISSED for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), as against Defendant WCAB.

Additionally, WCAB has moved to dismiss Plaintiff's suit on the grounds that the suit is barred under the 11th Amendment, which provides that a state and its agencies may not be sued in federal court absent their consent. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Plaintiff has provided no authority for the proposition that the state of California or the WCAB have consented to such lawsuits.

Therefore, the lawsuit must be DISMISSED as to Defendant WCAB on these alternative grounds.

3. Plaintiff's Pending Motions

Plaintiff has filed the following motions:

(1) Plaintiff has moved to join Workers' Compensation Judge Stanley Feinstein as a Defendant;

(2) Plaintiff has moved to "Preclude Toxic Exposures."

As the court lacks subject matter jurisdiction over Plaintiff's Amended Complaint, it declines to reach Plaintiff's motions.

ORDER OF DISMISSAL

ACCORDINGLY, Plaintiff's Amended Complaint is hereby ORDERED DISMISSED

Dated: August 27, 1993

/s/ LOURDES G. BAIRD

Lourdes G. Baird
United Stated District Judge

APPENDIX E

Second Appellate District, Division Three, No. B070197

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

No. SO31665

WILMA Wilson,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,

Respondent

ALPHA GRAPHIX, INC.,

Respondent

Filed April 28, 1993

ORDER

Petition for review DENIED

LUCAS

Chief Justice

APPENDIX F

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 *DATE: MARCH 4, 1993*

Wilma Wilson
5544 Calhoun Avenue
Van Nuys, CA 91401

RE:

WILMA Wilson,

v.

W.C.A.B.
Alpha Graphix, INC.

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2 Civil B070197

Filed October 29, 1992

ORDER

THE COURT:

The petition for writ of Amended Review is denied.

APPENDIX G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

B070197

WILMA WILSON,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD, ALPHA GRAPHIX, INC., et al.,

Respondents

Filed October 29, 1992

ORDER

THE COURT:

Within 30 days from the filing of this order, petitioner, Wilma Wilson, may file and serve an amended petition of writ of review containing page numbers and corrections of any clerical errors. Within 20 days from the date of service of the amended petition, respondents may file an answer to the amended petition.

Inasmuch as petitioner requested in her petition for reconsideration that the Workers' Compensation Appeals Board not await preparation of the transcripts before ruling on her petition for reconsideration, any request that this court review transcripts of the proceedings has been waived. (Lab. Code Section 5904: *U. S. Auto Stores v. Workmen's Comp. App. Bd.* (1971) 4 Cal. 3d 469, 476-477; *Allied Comp. Ins. Co. v. Ind. Acc. Com.* (1961) 57 Cal. 2d 115, 120-121.)

APPENDIX H

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
San Francisco

Case No. VN 148007; VN 163611/163612

WILMA Wilson,

Plaintiff,

v.

ALPHA GRAPHIX, INC.;
SAFECO INSURANCE, CO.,

Defendants

Filed August 14, 1992

OPINION AND ORDER DENYING
RECONSIDERATION

Applicant in propria persona, defendants, and Edward I Grant, applicant's former attorney and lien claimant herein, have each filed petitions seeking reconsideration of the Findings and Award issued June 30, 1992 in which a workers' compensation judge (WCJ) found that applicant, a photographer paste-up artist born November 23, 1945, sustained industrial injuries to her psyche and pulmonary system on March 1, 1985, resulting in temporary disability from March 2, 1985 to August 31, 1985, and in 25 1/2% permanent disability (PD). The WCJ further found that applicant may require further medical treatment, including possible psychiatric treatment. The WCJ determined that applicant's former

attorneys rendered services the reasonable value of which was $350.00, to be divided among them, with $250.00 payable to Harold Greene, $50.00 to Robert Winckler, and $50.00 to Edward Grant.

Applicant contends error, asserting that the WCJ mistakenly relied only on the reports of two Agreed Medical Examiners (AME), Dr. Michael Singer, the AME in psychiatry, and Dr. Robert Meth, the AME in pulmonary medicine, while allegedly ignoring the report of Dr. Edward J. O'Neill, the AME in Toxicology. Applicant further contends that the 25 1/2% PD rating is insufficient, essentially asserting that she is 100% disabled (see Petition for Reconsideration [PR], at pp. 16, 19). Applicant also alleges that on March 13, 1992 the WCJ should not have granted defendant's motion to dismiss applicant's January 4, 1992 application for serious and willful misconduct of her employer and should not have dismissed it with prejudice as barred by the statute of limitation (see Minutes if Hearing (Further) and Summary of Evidence dated March 13, 1992, at p. 2).

Defendants contend that the WCJ erroneously awarded possible future psychiatric treatment. Defendant further contend that the WCJ should have granted their motion to strike the recommended rating based on the "duplicate nature of applicant's pulmonary and psychiatric disability restriction" (see defendants' Petition for Reconsideration, at p. 10). Based on the alleged overlap, defendants assert that applicant should be rated only for a disability restricting applicant to work in an area free of chemical fumes (see *Id.*, at p. 11).

Lien claimant Grant contends that the entire $350.00 attorneys' fee allowed by the WCJ and the $50.00 specifically awarded him from the total sum are insufficient. Mr. Grant argues that the WCJ should have allowed at least 12% of the temporary disability indemnity and permanent disability indemnity benefits as a reasonable attorneys' fee. In light of his services, he further contends that his efforts should entitle him to half, i.e., 50% of the total 12% fee award he alleges is

justified in this matter. Mr. Grant further asserts that the WCJ violated Labor Code section 5908.5 be failing to set forth the basis for his distribution of the $350.00 attorneys' fee, and the basis for having allowed petitioner only $50.00.

Based on our independent review of the record, and for the reasons stated by the WCJ in his Report and Recommendation on Petition for Reconsideration (Report) which we adopt and incorporate, we will deny reconsideration and affirm the WCJ's decision. We further note that Mr. Grant's request for an increased attorney's fee is subject to dismissal for failure to comply with California Code of Regulations, title 8, section 10778 (WCAB Rule 10778) which requires him to inform applicant "by written notice of the attorney's adverse interest and of the applicant's right to seek independent counsel." We also not that applicant's contentions against the dismissal with prejudice of her application for serious and willful misconduct of the employer are untimely since it is more than 20 days plus five for mailing (see Lab. Code Sections 5900(a), 5903; Code of Civ. Proc. section 1013). The WCJ's dismissal with prejudice of the application for serious and willful misconduct is therefore no longer subject to reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration filed July 22, 1992, defendants' Petition for Reconsideration filed July 23, 1992, and Edward I. Grant's Petition for Reconsideration filed July 15, 1992 are DENIED.

WORKERS COMPENSATION APPEALS BOARD
SS/ Richard P. Gaunon

I CONCUR,
SS/ Arlene N. Heath
SS/ Dana Marshall

DATED AND FILED IN SAN FRANCISCO,
CALIFORNIA AUGUST 14, 1992
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
LISTED ON THE OFFICIAL ADDRESS RECORD
EXCEPT LIEN CLAIMANTS BUT SERVING
PETITIONING LIEN CLAIMANT

seb/s/ Susie L. Hannah

APPENDIX I

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
Van Nuys

No. 86 VNO 163611

WILMA WILSON,

Applicant,

v.

ALPHA GRAPHIX, INC.;
SAFECO INSURANCE, COMPANY.,

Defendants

Filed June 30, 1992

FINDINGS AND ORDER

Applicant in Propria Persona
Doris Nistler, Attorney for defendants

An application having been filed herein all parties having appeared and this matter having been regularly submitted for decision, the HONORABLE STANLEY S. FEINSTEIN, Workers' Compensation Judge, finds and order as follows:

FINDINGS OF FACT

1. WILMA Wilson, born November 23, 1945 while employed during the period April 29, 1984 through April 29, 1985 and around March 1985 as a photographer paste-

up artist at Los Angeles, California by Alpha Graphix, Inc., insured for workers' compensation by SAFECO INSURANCE COMPANY sustained injuries arising out of and occurring in the course of her employment to her psychiatric state and pulmonary system.

2. All benefits provided in companion case 86 VNO 163611.

ORDER

IT IS HEREBY ORDERED that these cases are dismissed.

/s/ STANLEY S. FEINSTEIN

STANLEY S. FEINSTEIN
WORKERS' COMPENSATION JUDGE

Filed and Served by mail
On June 30, 1992

By /s/ R G Sapinon

APPENDIX J

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
Van Nuys

No. 86 VNO 163611

WILMA WILSON,

Applicant,

v.

ALPHA GRAPHIX, INC.;
SAFECO INSURANCE, COMPANY.,

Defendants

Filed June 30, 1992

FINDINGS AND AWARD

Applicant in Propria Persona
Doris Nistler, Attorney for defendants

An application having been filed herein all parties having appeared and this matter having been regularly submitted for decision, the HONORABLE STANLEY S. FEINSTEIN, Workers' Compensation Judge, find and award as follows:

FINDINGS OF FACT

1. Applicant's and Defendant's motions to strike the recommended rating are denied.

2. WILMA WILSON, born November 23, 1945, while employed on March 1, 1985 as a photographer paste-up

artist at Los Angeles, California by Alpha Graphix, Inc., insured for workers' compensation by SAFECO INSURANCE COMPANY sustained injuries arising out of and occurring in the course of her employment to her psychiatric state and pulmonary system.

2. At the time of injury applicant's earnings were maximum.

3. Said injuries caused temporary disability from March 2, 1985 to August 31, 1985, payable at the rate of $224.00 per week.

4. Employment Development Department paid unemployment compensation insurance and their lien is allowed for concurrent periods of payment of temporary disability indemnity.

5. This injury caused permanent disability indemnity of 25 1/2%, equal to 98 weeks, payable at the rate of $140.00 per week for a total sum of $13,720.00.

6. Applicant may need further medical treatment including possible psychiatric treatment to cure or relieve from the effects of the injuries. Applicant is to first make demand on defendant with applicant to have a psychiatric evaluation to recommend such treatment.

7. Defendants failed to furnish adequate medical treatment and applicant incurred costs therefor, reimbursement for which is hereby allowed in an amount to be adjusted by and between the parties.

8. Applicant reasonably incurred medical-legal costs for medical reports, to prove her case and all medical-legal cost shall be paid by Defendant.

9. Applicant's prior attorneys rendered services of the reasonable value of $350.00 and shall be payable $250.00 to Harold Greene; $50.00 to Robert Winckler and $50.00 to Edward Grant.

AWARD

AWARD IS MADE in favor of WILMA Wilson against SAFECO INSURANCE COMPANY, of temporary disability indemnity of $224.00 per week for the periods

set forth in Finding No. 3; less credit for any amounts paid; less the EDD lien for concurrent periods of payment of temporary disability indemnity; permanent disability indemnity of $13,720.00, payable at $140.00 per week beginning on the fourth day after the last payment of temporary disability indemnity and weekly thereafter until fully paid; less credit for payments made; less $350.00 payable to applicants prior attorneys per finding no. 9; together with reimbursement for medical-legal costs and self-procured medical costs per Finding Nos. 7 and 8; and further medical and psychiatric treatment per finding no. 6.

/s/ STANLEY S. FEINSTEIN

STANLEY S. FEINSTEIN
WORKERS' COMPENSATION JUDGE

Filed and Served by mail
On June 30, 1992
By /s/ R G Sapinon

APPENDIX K

OPINIONS ON DECISION

No. 86 VNO 163611

WILMA WILSON

v.

ALPHA GRAPHIX, INC.;
SAFECO INSURANCE, COMPANY

Date June 29, 1992

JUDGE: STANLEY S. FEINSTEIN

CASE NO. 86 VNO 163612; 85 VNO 148007

Applicant's and Defendant's motions to strike the recommended rating are denied.

Based on applicant's testimony and the medical record relying especially on the medical report of Dr. Michael Singer dated January 12, 1990 and Dr. Robert Meth dated October 11, 1991 including his testimony on January 17, 1992, the Court finds applicant sustained injuries arising out of and occurring in the course of her employment to her psychiatric state and pulmonary system.

Pursuant to the rating served herein, applicant is entitled to 25 1/2% permanent disability indemnity, payable at $140.00 per week beginning September 4, 1985, for a total sum of $13,720.00, less permanent disability advances.

Applicant is entitled to temporary disability indemnity from March 2, 1985 to August 31, 1985 at the rate of $224.00 per week, based on the medical report of Dr. Robert Meth, less credit for amounts paid. The lien of EDD is allowed for concurrent periods of payment.

Applicant may require further medical treatment including possible psychiatric treatment as set forth in the testimony of Dr. Robert Meth. However, as to any psychiatric treatment required applicant is to first make a demand on defendants with applicant to have a psychiatric evaluation to recommend such treatment.

Applicant is entitled to reimbursement for self-procured medical treatment, the exact amount to be adjusted by the parties.

Defendants are to pay all medical-legal costs.

Attorneys fees of $400.00 are deemed reasonable and are allowed payable to former attorneys, Harold Greene, $250.00, and $50.00 each to attorneys Robert Winckler and Edward Grant.

Applicant during the period April 29, 1984 to April 29, 1985 and around March 8, 1985 sustained injuries arising out of and occurring in the ccurse of employment to her psychiatric state and pulmonary system. All benefits provided in companion case 86 VNO 163611, therefore these cases are ordered dismissed.

/pgs

/s/ STANLEY S. FEINSTEIN

STANLEY S. FEINSTEIN
WORKERS' COMPENSATION JUDGE

Filed and Served by mail
On June 30, 1992
By R G Sapinon

APPENDIX L

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal

The Constitution of the United States
Article III, Section 2

(1) The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;- to Controversies to which the United States shall be a party;-to controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fourteenth Amendment of the Constitution of the United States, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State of California

Article III, Section 1 of the Constitution of the State of California. Supremacy of federal constitution
The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

Article XIV, Section 4 of the Constitution of the State of California. Workers' Compensation

The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability.....incurred or sustained by the said workers in the course of the employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers.....the extent of relieving from the consequences of any injury.....incurred or sustained by workers in the course of their employment irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury;..... and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.
The Legislature is vested with plenary powers, to provide

for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by wither, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of review of decisions rendered by the tribunal of tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

Code of Regulations, Title 8
(formerly Administrative Code)

Section 5208(j) Medical Surveillance

(1) Medical Examination

(B) The examination hsall include , as a minimum, a history to elicit symptomatology of upper and lower respiratory and gastrointestinal systems, a 14- inch by 17-inch posterior-anterior chest X-ray, right and left anterior oblique chest X-rays, pulmonary function tests including forced vital capacity (FVC) and forced expiratory volume at one second (FEV_1).

(2) For employees 40 years of age or older with 10 years or more since initial occupational exposure to asbestos, the medical examination, as described in Section 5208(j)(1)(B), shall be performed annually, except that the oblique X-rays need only be performed every three years. A rectal examination and a stool guaiac test for occult blood shall be performed.

Section 9727. Subjective Disability

Subjective disability should be identified by:

1. A description of the activity which produces the disability.

2. The duration of the disability.

3. The activities which are precluded and those which can be performed with the disability.

4. The means necessary for relief. The terms shown

below are presumed to mean the following:

1. A *severe* pain would preclude the activity precipitating the pain.

2. A *moderate* pain could be tolerated, but would cause marked handicap in the performance of the activity precipitating the pain.

3. A *slight* pain could be tolerated, but would cause some handicap in the performance of the activity precipitating the pain.

4. A *minimal* (mild) pain would constitute an annoyance, but causing no handicap in the performance of the particular activity, would be considered as non ratable permanent disability.

Labor Code Section 5952(d). Extent of review

The review by the court shall not be extended further than to detrmine, based upon the entire record which shall be certified by the appeals board, whether:

(a) The appeals board acted without or in excess of its power.

(b) The order, decision, or award was procured by fraud.

(c) The order, decision, or award was unreasonable.

(d) The order, decision, or award was not supported by substantial evidence.

(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

APPENDIX M

UNITED STATES CENSUS BUREAU

Population

	1987	%	1990	%
Nationwide	242,321,000	100	249,402,000	100
California	27,781,000	11.5	29,905,000	12

SUPPLEMENTAL SECURITY INCOME

Number of Disabled

	1987	%	1990	%
Nationwide	2,846,191,000	100	3,279,400,000	100
California	443,902,000	15.6	525,749,000	16

Amount of Payment

	1987	%	1990	%
Nationwide	9,256,948,000	100	12,244,622,000	100
California	2,113,695,000	22.8	2,850,009,000	23.3

APPENDIX N

LIST OF DISABILITIES AND STANDARD RATING

Disability Number	Disability	Standard Rating
1.5	Post Traumatic Head Syndrome*: (#1)	
1.52	Slight	20%
1.54	Moderate	50%
1.56	Severe	100%
1.6	Vertigo*:	
1.62	Slight	10%
1.64	Moderate	50%
1.66	Severe	100%
1.7	Headache*:	
1.72	Slight	5%
1.74	Moderate	15%
1.76	Severe	60%
1.77	Pronounced	100%
5.3	Impairment of Smell and Taste:	
5.31	Loss of Sense of Smell	5%
5.32	Loss of Sense of Taste	5%
5.33	Loss of Sense of Smell & Taste	10%
6.1	Chronic Affections of the Pulmonary Tissue*: (See Note #1)	
6.12	Slight	10%
6.14	Moderate	40%
6.16	Severe	75%
6.17	Pronounced	100%

* The rating may be increased or decreased from the schedule rating where the degree of disability so warrants.

1. Includes disability resulting from Tuberculosis, Silicosis and other Pneumoconioses.

2. May include the following factors - vertigo, impairment of memory, impairment of concentration, headache, fatigability, nrevousness, irritability, mental deterioration

APPENDIX O

DIR News Release
California Department of Industrial Relations,
P.O. Box 603, San Francisco, CA 94101

FOR IMMEDIATE RELEASE
October 24, 1994
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DIR Release Updated Report on Workers' Comp Reform Progress

SAN FRANCISCO -- Detailing the success of workers' compensation reform efforts since 1991, the Department of Industrial relations has released an updated version of its report on the progress accomplished following enactment of key legislation, director Lloyd W. Aubry, Jr. announced.

Last July, Governor Pete Wilson announced the release of *Meaningful Workers' Compensation Reform in California: A Progress Report*, a publication produced by DIR. Now, new developments, including an additional premium rate cut and testimonials from employers, have been incorporated into an updated version. The new publication is titled *Meaningful Workers' Compensation Reform in California: The Progress Continues.*

"Over the past three years, Governor Wilson signed 11 major reform and anti-fraud bills," Aubry said. "As a result of these efforts, the minimum rate for workers' compensation insurance has declined by 31 percent in the past fifteen months. these reforms have worked, improving California's competitiveness and spurring job creation."

As a result of the savings from reform, the Department of Insurance ordered a rate reduction of

16 percent effective October 1, bringing the total reduction since July 1993 to 31 percent. The decreases mean that the average workers' compensation premium has dropped from $4.93 to $3.36 per $100 of payroll, according to estimates by the Workers' Compensation Insurance Rating Bureau and the Division of Workers' Compensation.

"Clearly, the estimated savings from reform of $1.5 billion have been met, and likely they have been exceeded," Aubry said.

Copies of *Meaningful Workers' Compensation Reform in California: The Progress Continues* are available by writing the Department of Industrial Relation, Office of the Director, P.O. Box 420603, San Francisco, CA 94142-0603, Attn.: Workers' Comp Report, or by calling (415) 703-5380.